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Lies, Deceit & the Ethical Rules, can Prosecutors Lie for the Public Good?

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Lies, Deceit and the Ethical Rules, Can Prosecutors Lie for the Public Good?

A. A prosecutor is held to a higher standard of ethical conduct because of his role in the administration of justice.

1. The tenor of the case law discussing the role of prosecutors makes clear that prosecutors are held to the highest standard because of their unique powers and responsibilities. A prosecutor has responsibilities beyond that of an advocate, and has a higher duty to assure that justice is served.
2. "The prosecutor's interest in a criminal prosecution 'is not that it shall win a case, but that justice shall be done.'" *Pool v. Superior Court*, 139 Ariz. 98, 103, 677 P.2d 261, 266 (1984) (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)).
3. The prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).
4. A prosecutor's substantial experience is an aggravating factor is a disciplinary action because prosecutors are held to a higher standard of conduct than other attorneys. ("A prosecutor is not simply another lawyer who happens to represent the state. Because of the overwhelming power vested in his office, his obligation to play fair is every bit as compelling as his responsibility to protect the public."). (citation omitted). *In re Zawada*, 92 P.3d 862, 208 Ariz. 232 (Ariz. 2004)
5. When a Government lawyer, with enormous resources at his or her disposal, abuses this power and ignores ethical standards, he or she not only undermines the public trust, but inflicts damage beyond calculation to our system of justice. This alone compels the responsible and ethical exercise of this power. *In re Doe*, 801 F.Supp. 478, 480 (D.N.M.1992).

6. A prosecutor's responsibility to enforce the laws in his judicial district grants him no license to ignore those laws or the Code of Professional Responsibility. *People v. Reichman*, 819 P.2d 1035 (Colo. 1991).
7. Prosecutor argued that Judicial Branch could not discipline prosecutor because his function was within executive branch of government and any discipline would violate separation of powers. Court rejected arguments stating, "All parties recognize that unlike other constitutional officers, prosecutors must perform their constitutional function nearly exclusively in the forum of another branch of government, the judiciary. They must also be licensed to practice law by that other branch of government, and in effect, they must depend upon that other branch for proper recognition of their role." *Massameno v. Statewide Grievance Committee*, 663 A.2d 317, 234 Conn. 539 (Conn. 1995).

B. The rules of professional responsibility require a prosecutor to be honest with the court, with defense counsel and those not represented by counsel.

A. E.R. 3.3, "Candor Toward a Tribunal"

A lawyer shall not *knowingly* do any of the following:

- (1) make a **false** statement of fact or law to a *tribunal* or fail to correct a false statement of material fact or law previously made to the *tribunal* by the lawyer;
- (2) fail to disclose to the *tribunal* legal authority in the controlling jurisdiction *known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;
- (3) offer evidence that the lawyer *knows* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to *know* of its falsity, the lawyer shall take *reasonable* measures to remedy the situation, including, if necessary, disclosure to the

tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer *reasonably believes* is false.

- b. A lawyer who represents a client in an adjudicative proceeding and who *knows* that a person, including the client, intends to engage, is engaging, or has engaged in criminal or *fraudulent* conduct related to the proceeding shall take *reasonable* measures to remedy the situation, including, if necessary, disclosure to the *tribunal*.
- c. The duties stated in divisions (a) and (b) of this rule continue until the issue to which the duty relates is determined by the highest *tribunal* that may consider the issue, or the time has expired for such determination, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- d. In an *ex parte* proceeding, a lawyer shall inform the *tribunal* of all material facts *known* to the lawyer that will enable the *tribunal* to make an informed decision, whether or not the facts are adverse.

B. Disciplinary Cases Interpreting These Rules.

- 1. *In Re Peasley*, 90 P.3d 764 (Ariz. 2004) Police officer and prosecutor misrepresented facts at 2 aggravated murder trial and indicated that police did not know that defendants were suspects when interviewed informant.
 - a. Police officer told informant that 2 defendants were suspects in murder. Told court and jury that police officer did not have information on defendants until after spoke to informant.
 - b. Court found that Peasley intentionally violated Arizona Rule of the Supreme Court 42, Ethical Rule ("E.R.") 3.3(a)(4) (candor toward the tribunal), E.R. 4.1(a) (false statement of material fact or law), E.R. 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and E.R. 8.4(d) (conduct prejudicial to the administration of justice).

- c. By presenting false testimony in the prosecution of two defendants charged with capital murder, Peasley violated one of the most important duties of a lawyer. "We cannot conceive of a more serious injury, not just to the defendants but to the criminal justice system, than a prosecutor's presentation of false testimony in a capital murder case."
- d. Court found selfish motive by prosecutor by obtaining a conviction using false evidence.
- e. Court ordered permanent disbarment stating: "A prosecutor who deliberately presents false testimony, especially in a capital case, has caused incalculable injury to the integrity of the legal profession and the justice system. In such a circumstance, the public's interest in seeing that justice has been fairly administered has been violated in a most fundamental way."

1. Rule 8.2 Judicial Officers

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Cases interpreting this rule: After being found in contempt of court and fined \$250, attorney filed pleadings indicating Judge has so negligently and carelessly failed to give consideration to, in these matters and accused Judge of "skewing ... the facts" and "fail[ing] to tell the truth." Attorney further stated, "I cannot tolerate a Judge lying to this Court, to this Attorney, to the Judicial Review Commission and to the Virginia State Bar. He is flat out inaccurate, and wrong." Pilli also threatened to use his "influence ... to have [Judge Cassidy] removed" from office. Virginia Supreme Court found these comments violated this rule. *Pilli v. Virginia State Bar*, 611 S.E.2d 389, 269 Va. 391 (Va. 2005)

2. Rule 3.4. Fairness to opposing party and counsel.

A lawyer shall not:

unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; ***

- A. Attorney violated 3.4 (a) when representing a criminal defendant he observed the State's witness list that included the mother of his client. He told his client's mother to leave town for two weeks in order that she could avoid State's subpoena. *In Re Putsey* 790 N.E.2d 436 (Ind. 2003).
- B. By failing to make a reasonably diligent effort in the criminal action to comply with the legally proper discovery requests of an opposing party, prosecutor violated Prof.Cond.R. 3.4(d). *Matter of Miller*, 677 N.E.2d 505 (Ind. 1997).

3. Rule 3.8, Additional Responsibilities Of A Prosecutor

A lawyer engaged in a prosecutorial function shall:

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;***

A. *In re Aubuchon*, 309 P.3d 886, 233 Ariz. 62 (Ariz. 2013) Court found that prosecutor violated rule 3.8 by filing criminal charges against judge without probable cause. The panel found that Aubuchon violated her responsibility as a prosecutor in violation of ER 3.8(a) and prejudiced the administration of justice in violation of ER 8.4(d) by knowingly filing the criminal complaint without probable cause and for the purposes of avoiding the December 9 hearing and compelling Judge Donahoe's recusal.

4. RULE 4.3: DEALING WITH UNREPRESENTED PERSON

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

A. *In re Blumenthal*, 825 N.E.2d 374 (Ind. 2005) Attorney in personal injury action changed medical release by adding name of unnamed doctor. Attorney obtained relevant information after changing this document. Attorney violated this rule by: "Acting in a manner such that an unrepresented person might misunderstand the lawyer's role in the matter, by soliciting patient medical records from plaintiff's doctor using an altered consent form and without identifying herself as counsel adverse to the doctor's patient."

5. Rule 8.4. Misconduct

1. **ER 8.4. Misconduct:** It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice; ***

2. *In re Hansen*, 179 Ariz. 229, 877 P.2d 802 (1994). Prosecutor had trial scheduled but thought it would be resolved and sent witness home. When case did not plead, lied to court and defense that witness did not show up and court dismissed case without prejudice. Prosecutor resigned that same day. The Commission stated that by allowing witness to leave prior to the trial and allowing the case to be dismissed, Hansen violated ER 1.3, which demands that a lawyer act with reasonable diligence.

- a. By indicating to both the judge and the defense attorney that the victim witness had not appeared for the trial, Hansen violated ER 3.3(a)(1) and ER 4.1(a), which provide that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal or third person.
- b. Hansen violated ER 8.4(a), (c), and (d), by violating the rules of professional conduct and engaging in conduct that involves dishonesty, deceit, or misrepresentation and that is prejudicial to the administration of justice.
- c. Prosecutor given censure because of inexperience and decision to resign.

3. *Morrissey v. Virginia State Bar*, 448 S.E.2d 615, 248 Va. 334 (Va. 1994).
Prosecutor engaged in deceitful conduct when he negotiated rape case and had defendant plead to misdemeanor. As part of plea agreement, defendant's father was to pay victim \$25,000. The prosecutor also indicated that defendant's father would pay \$25,000 to prosecutor who would use money for charitable donation of his choice. Prosecutor did not reveal charitable agreement was part of case when defendant plead guilty. Court found he used charitable donation to curry favor for political purposes and he deceived the Court by not informing court this charitable donation was part of plea agreement.
4. *Florida Bar v. Feinberg* 760 So.2d 933 (Fl. 2000). Defendant represented by counsel and intended to fire his attorney and work as informant in order to obtain favorable treatment on drug convictions. Defendant told prosecutor that his attorney represents many drug defendants and it would be best if his attorney was not told about informant status. Defendant did not fire attorney and assistant prosecutor lies to defense attorney about meetings with defendant.
 - a. Florida Supreme Court finds 4.2 violation for speaking with person represented by counsel.
 - b. 8.4(c) violation for from engaging in deceitful conduct.
 - c. 8.4(d) violation for engaging in conduct that is prejudicial to the administration of justice.
 - d. Prosecutor given public reprimand. (Florida Bar recommended 3 year suspension).
5. *Florida Bar v. Cox*, 794 So.2d 1278, 26 Fla. L. Weekly S331 (Fla. 2001)
Custom agents investigating child pornography had informant, Adair Jackson, pose as 13 year old girl and gave her alias, Gracie Griggs. After defendant was arrested, Asst. U.S. attorney Cox did not disclose witnesses' true identity and had her identify herself on witness stand as Gracie Griggs. Court and defense counsel did not learn of her identity until midtrial and court granted mistrial. After trial defense counsel learned that Ms. Adair had criminal record.
 - A. Florida Disciplinary violations included:
 - a. 4-3.3(a)(1) (lawyer shall not knowingly make false statement of material fact or law to a tribunal);
 - b. 4-3.3(a)(4) (lawyer shall not knowingly permit any witness to offer testimony that the lawyer knows to be false);

- c. 4-3.4(a) (lawyer shall not unlawfully obstruct another party's access to evidence or otherwise conceal other material that the lawyer knows or should know is relevant to pending proceeding, nor assist another person to do such an act);
 - d. 4-3.4(b) (lawyer shall not fabricate evidence, or counsel or assist a witness to testify falsely).
 - e. The public expects and deserves fairness and candor from attorneys, especially from a prosecutor who has the power and responsibility derived from representing the government.
 - f. Prosecutor Cox was suspended for one year and placed on one year probation.
6. *In Re Gotti* 8 P.3d 966 (Or. 2000). An attorney in Oregon represented chiropractors and believed that company reviewing insurance claims was engaging in fraudulent activities. In order to investigate claims, he called company and falsely represented himself a chiropractor who was interested in employment with company indicating he saw patients, performed independent medical examinations, that he performed file and case reviews. After obtaining information from company he filed a civil suit against company.
- A. Attorney charged with violating DR 1-102(A)(3) provides that "[i]t is professional misconduct for a lawyer to * * * [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation.
 - Also charged with DR 7-102(A)(5) which provides that, in the course of representing a client or the lawyer's own interests, "a lawyer shall not * * * [k]nowingly make a false statement of law or fact."
 - Attorney claimed that there was investigative exception to ethical rules where he could misrepresent identity to uncover fraudulent conduct.
 - The State Attorney General and United States Attorney filed amicus briefs indicated that the Court should adopt an exception to this rule that

government attorneys can advise law enforcement officers regarding deceptive conduct without violating rule.

- Court rejected any “investigatory exception” to ethical rules indicating that exception must be written into rules and not judicially imposed.
- Soon thereafter, Oregon amended its version of Rule 8.4 to authorize any attorney—public or private—to direct clients or other persons to engage in deception or misrepresentations “in the investigation of violations of civil or criminal law or constitutional rights” so long as the attorney otherwise complies with the *Model Rules* and has a good-faith belief that “unlawful activity has taken place, is taking place or will take place in the foreseeable future.”

7. *In Re Pautler* 47 P.3d 1175 (Colo. 2002). William Neal had just brutally murdered three women and raped a third woman at gunpoint after she watched one of the murders. He subsequently released three hostages and told them to contact the police and gave them his pager number. The police spoke to Mr. Neal for three hours and he agreed to surrender if he could talk to a public defender before his surrender. Afraid that the ax murderer was an immediate danger to the public, Chief Deputy District Attorney Mark Pautler agreed to impersonate a public defender. He spoke to Mr. Neal and told him his name was Mark Palmer and he agreed to be present when Mr. Neal surrendered. He never spoke to Mr. Neal again and never told Mr. Neal about the impersonation after he surrendered.

- a. Colorado’s Office of Attorney Regulation Counsel charged Pautler with violating Colorado’s equivalents to Rules 4.3 and 8.4(c) for how he dealt with the unrepresented Neal and for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- b. The Court rejected Pautler’s defense that there was a public harm exception to the ethical rules.
- c. “Pautler cannot compromise his integrity, and that of our profession, irrespective of the cause.”

- d. The court also disliked the fact that Pautler never informed Neal to retain an attorney, and more troubling, purported to represent Neal in the matter even though Pautler's only goal in the matter was to arrest and prosecute Neal.
 - e. "District attorneys in Colorado owe a very high duty to the public because they are governmental officials holding constitutionally created offices. This court has spoken out strongly against misconduct by public officials who are lawyers. The respondent's responsibility to enforce the laws in his judicial district grants him no license to ignore those laws or the Code of Professional Responsibility." (Citations omitted).
 - f. Court ordered three-month suspension, which was stayed during twelve months of probation.
8. *Matter of Malone*, 105 A.D.2d 455, 480 N.Y.S.2d 603 (1984). New York Inspector General received information from prison guard that inmate had been beaten by other guards for no reason. In order to keep the identity of the guard a secret and to protect the guard against retaliation, the Inspector General took his sworn statement in secret and then instructed this prison guard to lie under oath when he gave a statement in front of the other prison guards. Disciplinary charges were brought against the prison guards and the informant guard testified and explained that he had given a false statement under oath at the direction of the Inspector General.
- a. Respondent charged with professional misconduct in violation of DR 1-102 that states "A lawyer shall not: * * * engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."
 - b. Rejected Respondent's argument that his conduct was not unethical because it was motivated by a desire to protect informant guard and prompted by his responsibilities as Inspector General indicating the end does not justify the means.
 - c. Ethical canons cited by respondent in support of his conduct, requiring competent and zealous representation of clients, cannot in and of themselves overcome the proscription against directing another to give false testimony.
 - d. Holding a public office, such as Inspector General, is not a shield behind which breaches of professional ethics, otherwise warranting disciplinary action, are permitted. Rather, a lawyer who holds public office must not

only fulfill the duties and responsibilities of that office, but must also comply with the Bar's ethical standards.

e. Attorney was given public censure.

9. *People v. Reichman*, 819 P.2d 1035 (Colo. 1991). Undercover police officer believed his identity had been discovered and elected prosecutor arranged to have officer arrested for possession of drugs and marijuana in order to continue undercover operation. As part of the plan, fictitious charges were lodged against the officer. The prosecutor either personally or through his agents, filed a false criminal complaint against officer charging him with the illegal possession of a firearm and of marihuana. Other documents filed by or on behalf of the prosecutor included a surety bond and an offense report, falsely stating "the officer's name and address, and falsely stating that he had committed certain criminal offenses. The officer appeared in county court and made false statements to the county judge, who was unaware of the deception.

a. Prosecutor charged with violations of DR 1-102(A) (4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

a. DR 1-102(A)(5) (a lawyer shall not engage in conduct prejudicial to the administration of justice);

b. DR 1-102(A)(6) (a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law).

c. Prosecutor cited several criminal sting operations where court did not find prosecutorial misconduct in criminal case.

d. Court rejected argument stating, "Prosecutorial deception may not always constitute prosecutorial misconduct for purposes of determining whether a criminal complaint or indictment must be dismissed. It does not necessarily follow, however, that prosecutorial deception of a type which results in directly misleading a court should be exempted from the proscriptions of the Code of Professional Responsibility simply because the deception is not such as to warrant the dismissal of a criminal case."

e. Court publicly reprimanded Prosecutor and assessed him the costs of proceedings in the amount of \$4,851.28.

10. *In re Friedman*, 76 Ill.2d 392, 30 Ill.Dec. 288, 392 N.E.2d 1333 (1979).

The chief of the criminal division of Cook County Prosecutor's Office, Mr. Friedman, received information that a defense attorney had offered to bribe a

police officer. Prosecutor instructed the police officer to cooperate with the defense attorney and to accept the bribe as part of a sting operation. The prosecutor instructed the police officer to lie under oath that the breathalyzer officer was not present to testify. The case was dismissed and the officer was paid a \$50 bribe by the attorney. The Court was told about the false testimony after the sting operation. In another case, Mr. Friedman had a police officer lie under oath that witnesses were unavailable and that officer was paid \$250. The court was subsequently told about the false testimony.

- a. Prosecutor charged in part with violation of Disciplinary Rule 1-102(A)(4), "conduct involving dishonesty, fraud, deceit, or misrepresentation.
- b. Disciplinary Rule 7-102(A)(4),(A)(6), which provide: In his representation of a client a lawyer shall not: (4) Knowingly use perjured testimony or false evidence, (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false."
- c. Prosecutor Friedman argued that the ends justified the means and that there was no other way to prosecute corrupt attorneys.
- d. The Court rejected that argument stating, "The integrity of the courtroom is so vital to the health of our legal system that no violation of that integrity, no matter what its motivation, can be condoned or ignored."
- e. Although Court found disciplinary violation, Court did not impose sanction.